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No. 99-

IN THE

Supreme Court of the United States

GARY C. TYLER,

Petitioner,

v.

GEORGE M. O'NEILL, MICHELENIA O'NEILL and WM. M. HENDRICKSON, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a timely filed appeal divests a district court of jurisdiction to decide a second motion for reconsideration of the district court's order denying post-trial motions pursuant to Fed. R. App. P. 4(a)(4) which was filed after the appeal?

2. Whether the district court committed "plain error" requiring a new trial on the issue of the affirmative defense of the statute of limitations by failing to give the jury *any* instructions on the defense of the statute of limitations, when Petitioner did not submit a jury instruction because the district court had directed Respondents to do so?

LIST OF PARTIES

Petitioner Gary Tyler and Respondents George and Michelenia O'Neill are individuals. Wm. M. Hendrickson, Inc., which was a party below but not implicated by the Petition, is a non-public corporation owned by Tyler and George O'Neill.

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Petitioner Gary Tyler respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in this proceeding on July 26, 1999, which affirmed the orders of the district court granting Respondents' second motion for reconsideration of the district court's order dismissing Respondents' post-trial motions and granting Respondents' post-trial motions, in part.

OPINIONS BELOW

The July 26, 1999 memorandum opinion of the United States Court of Appeals for the Third Circuit that gives rise to this petition is unreported. It is reprinted in Appendix A hereto ("App. A") at page 1a. By order filed August 24, 1999, the United States Court of Appeals for the Third Circuit denied the petition for panel rehearing and rehearing *en banc*. App. F, 42a. The district court's memorandum order dated October 6, 1998 (the "Denial Order") dismissing the post-trial motions of Respondents George and Michelenia O'Neill (the "O'Neills") and denying the post-trial motions of Petitioner Gary Tyler ("Tyler") (reproduced at App. D, 33a); order dated October 8, 1998 denying the O'Neills' first motion for reconsideration of the Denial Order (reproduced at App. E, 40a); memorandum order dated November 2, 1998 granting the O'Neills' second motion for reconsideration of the Denial Order (reproduced at App. C, 30a); and memorandum of decision and order dated December 15, 1998 granting the O'Neills' post-trial motions, in part, (reproduced at App. B, 28a) have not been published and are attached hereto.

STATEMENT OF THE BASIS OF JURISDICTION OF THE SUPREME COURT

The statutory provision for this Court's jurisdiction is 28 U.S.C. § 1254. The United States Court of Appeals for the Third Circuit issued its Decision by way of memorandum opinion on July 26, 1999. Panel rehearing and rehearing *en banc* were timely requested. Rehearing was denied on August 24, 1999. Pursuant to Supreme Court Rule 13.1, this Petition was timely filed within 90 days of the panel rehearing denial, and is thus timely.

RULES INVOLVED

FED. R. APP. P. 4(A)(4)

Fed. R. App. P. 4(a)(4) provides:

Effect of a Motion on a Notice of Appeal.

(A) If a party timely files in the district court any of the following motions under the Federal Rules of Civil Procedure, the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion:

(i) for judgment under Rule 50(b);

(ii) to amend or make additional factual findings under Rule 52(b), whether or not granting the motion would alter the judgment;

(iii) for attorney's fees under Rule 54 if the district court extends the time to appeal under Rule 58;

(iv) to alter or amend the judgment under Rule 59;

(v) for a new trial under Rule 59; or

(vi) for relief under rule 60 if the motion is filed no later than 10 days (computed using Federal Rule of Civil Procedure 6(a)) after the judgment is entered.

(B)

(i) If a party files a notice of appeal after the court announces or enters a judgment—but before it disposes of any motion listed in Rule 4(a)(4)(A)—the notice becomes effective to appeal a judgment or order, in whole or in part, when the order disposing of the last such remaining motion is entered.

(ii) A party intending to challenge an order disposing of any motion listed in Rule 4(a)(4)(A), or a judgment altered or amended upon such a motion, must file a notice of appeal—in compliance with Rule 3(c)—within the time

> prescribed by this Rule measured from the entry of the order disposing of the last such remaining motion.
>
> (iii) No additional fee is required to file an amended notice.

FED. R. CIV. P. 51. Instructions to Jury: Objection

Federal Rule of Civil Procedure 51 provides:

> At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury. The court, at its election, may instruct the jury before or after argument, or both. No party may assign as error the fixing or the failure to give an instruction unless that party object thereto before the jury retires to consider the verdict, stating distinctly the matter objected to and the grounds of the objection. Opportunity shall be given to make objection out of the hearing of the jury.

STATEMENT OF THE CASE

In 1982, Tyler acquired a 10% interest in Wm. M. Hendrickson, Inc. ("Hendrickson") which was run by George O'Neill and his wife, Michelenia (the "O'Neills"). From 1982 up through 1996, Tyler was a passive investor. However, in

1996, Tyler accepted a position as an employee of Hendrickson. In the course of his employment, Tyler discovered that the O'Neills had defrauded Tyler out of his fair share of income from Hendrickson.

In 1997, Tyler filed a complaint with the United States District Court for the Eastern District of Pennsylvania alleging claims for fraud, breach of fiduciary duty, violation of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961, *et seq.*, and conspiracy to violate RICO. Jurisdiction of the district court was based upon the existence of a federal question pursuant to 28 U.S.C. § 1331, and, alternatively, upon diversity of citizenship pursuant to 28 U.S.C. § 1332.

At the conclusion of trial, pursuant to the court's direction, the O'Neills submitted a proposed jury instruction on their affirmative defense of the statute of limitations brought pursuant to 42 Pa. Cons. Stat. Ann. § 5524. The district court instructed the O'Neills to provide a jury instruction on the affirmative defense of the statute of limitations, which it then rejected. As a result, Tyler did not submit an instruction and the district court failed to charge the jury at all with regard to the burden of proof and evidence required to sustain the affirmative defense of the statute of limitations. The jury, without any guidance, was directed to answer special verdict interrogatories about, *inter alia*, when Tyler "discovered" and "should have discovered" that he was harmed by the O'Neills' conduct.

On June 4, 1998, the jury found that the O'Neills had defrauded Tyler and awarded $225,000 in damages against George O'Neill only. In response to the interrogatories, the jury found that Tyler had discovered the harm in November,

1996 and should have discovered the harm in March, 1991. The district court reduced the jury verdict against the O'Neills to final judgments dated June 5 and June 11, 1998 (the "Original Judgment"). The O'Neills and Tyler filed timely post-trial motions pursuant to Fed. R. Civ. P. 50 and 59.[1]

By order dated October 6, 1998 (the "Denial Order"), the district court dismissed the O'Neills' post-trial motions for failure to prosecute and denied Tyler's post-trial motions on the merits. By order dated October 8, 1998, the district court denied the O'Neills' first motion for reconsideration of the Denial Order.[2] Tyler filed a timely notice of appeal of the Denial Order on October 13, 1998. The O'Neills then filed a second motion for reconsideration of the Denial Order on October 16, 1998.[3] By order dated November 2, 1998, the district court granted the second motion for reconsideration of the Denial Order and vacated its October 6 and 8 Orders.

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1. Tyler sought additur or a new trial on damages only against Mrs. O'Neill since it made no sense that the jury would find that she and her husband committed fraud, but did not award damages against her. Tyler also moved for appointment of a custodian or receiver for Hendrickson based on the jury verdict.

2. The first motion for reconsideration was styled as a motion to vacate the Denial Order. However, as Respondents themselves recognized in their Third Circuit brief, "the character of the motion is determined by its function, not its title," *citing New Castle County v. Hartford Acc. and Indem. Co.*, 933 F.2d 1162, 1176 (3d Cir. 1990).

3. This motion was styled as a motion for reconsideration of the October 8, 1996 order.

By order and opinion dated December 15, 1998, the district court granted the O'Neills' post-trial motions, in part, holding that based on the jury interrogatories that the statute of limitations barred Tyler's claims and entered judgment in favor of the O'Neills. Tyler filed a timely notice of appeal of this order on December 23, 1998. The United States Court of Appeals for the Third Circuit affirmed the December 15 order and judgment.

REASONS FOR GRANTING THE WRIT

I.

THE OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DIRECTLY CONFLICTS WITH FIFTH AND ELEVENTH CIRCUIT DECISIONS HOLDING THAT MOTIONS FOR RECONSIDERATION OF ORDERS DENYING POST-TRIAL MOTIONS DO NOT STAY APPELLATE JURISDICTION

Whether a federal court has jurisdiction to act is of fundamental importance. Fed. R. App. P. 4(a)(4)(A) provides clear guidance that only the post-trial motions enumerated in the Rule, i.e. pursuant to Fed. R. Civ. P. 50(b), 52(b), 54, 59, and 60 stay appellate jurisdiction once a timely appeal is filed. Otherwise, "the timely filing of a notice of appeal is an event of jurisdictional significance, immediately conferring jurisdiction on a Court of Appeals and divesting a district court of its control over those aspects of the case involved in the appeal." *Venen v. Sweet*, 758 F.2d 117, 119 (3d Cir. 1985). The instant Third Circuit Panel recognized such, noting:

> The simple issue before us is whether the O'Neills' October 16th [second] motion for reconsideration, filed after Tyler's appeal and decided after the O'Neills' appeal, is the type of post-trial motion which stays appellate jurisdiction. If not, the District Court was without jurisdiction to enter the November 2 and December 15 orders.

App. at 6a (brackets omitted).

The second motion for reconsideration clearly did not fall within the tolling provisions of Fed. R. App. 4(a)(4). It was not a motion for judgment as a matter of law pursuant to Fed. R. Civ. P. 50(b) or for a new trial pursuant to Fed. R. Civ. P. 59 and, even if it was such a motion, it was filed outside the ten-day period after judgment was imposed under the Federal Rules. Every other circuit court of appeals which has addressed this issue has concluded that motions for reconsideration, let alone *second* motions for reconsideration, of orders denying post-trial motions do not stay appellate jurisdiction.[4]

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4. Ironically, precedent of the Third Circuit which was cited by Tyler to the Panel, but not discussed in its opinion, requires the result requested. For example, in *Turner v. Evers*, 726 F.2d 112, 114 (3d Cir. 1984), the court held that

> an application for reargument of a prior motion for a new trial is not to be regarded as itself a motion for a new trial or even a renewal of such a motion . . . Thus, the mere filing of an application of reargument of a motion for a new trial does not stop the running of the appeal period . . . we see no good reason to allow such motions either to postpone the time for appeal or to destroy the appeals filed during their pendency.

(Cont'd)

For example, in *Wansor v. George Hantscho Co. Inc.*, 570 F.2d 1202, 1206 (5th Cir. 1978), *cert. denied*, 439 U.S. 959, 99 S. Ct. 350 (1978), the Fifth Circuit Court of Appeals held that a "motion to reconsider an order disposing of a motion of the kind enumerated in Rule 4(a) does not again terminate the running of the time for appeal." Similarly, in *Wright v. Preferred Research, Inc.*, 891 F.2d 886, 888 (11th Cir. 1990), the Eleventh Circuit Court of Appeals explained:

> Rule 59 applies to motions for reconsideration of matters encompassed in a decision on the merits of a dispute . . . A notice of appeal filed before entry of judgment denying a motion for reconsideration is ineffectual . . . This general rule applies, however, only where the motion for reconsideration represents the movants' first attack on the trial court's judgment . . . **Both the language and purpose of Rule 4(a)(4) indicate that the time for appeal is postponed only by an original motion of the type specified. I.e., a motion to reconsider an order disposing of such a motion will not further postpone the time for appeal.**

Id., 891 F.2d at 888 (*citing* 9 Moore's Federal Practice, &204.12[1] (emphasis added).

(Cont'd)

See also Bane v. Netlink, 925 F.2d 637, 639 (3d Cir. 1991) ("motion [for reconsideration] cannot be treated as a Rule 59(e) motion to toll the time for taking an appeal under Fed. R. App. P. 4(a)(4) as to the order of dismissal because it would then be a prohibited motion for re-reconsideration").

The policy underlying this result is sound: "the interest of finality requires that the parties generally get one bite at the Rule 59(e) apple for the purposes of tolling the time for bringing an appeal." *Stangel v. United States*, 68 F.3d 857, 859 (5th Cir. 1995) (holding successive motions for reconsideration do not toll the appeal period under Fed. R. App. P. 4(a)(4)). If this were not so, parties could delay the appellate period *ad infinitum* by filing motions for reconsideration *ad seriatim* — which would have prevented Tyler from obtaining appellate review of his post-trial motions, including one seeking a custodian or receiver for Hendrickson.

The decision of the Third Circuit Court of Appeals directly conflicts with those of two other Circuit Courts and misinterprets Fed. R. App. P. 4(a)(4). The district court lacked jurisdiction to decide the second motion for reconsideration and thus, had no authority to vacate the Original Judgment. Clear guidance from this Court is needed to resolve the conflict among the Circuits and to avert potentially inconsistent results occurring where district courts and circuit courts simultaneously exercise jurisdiction over the same case.

II.

THE DISTRICT COURT'S FAILURE TO PROVIDE ANY JURY INSTRUCTION ON THE STATUTE OF LIMITATIONS DEFENSE, INCLUDING THE BURDEN OF PROOF, CONSTITUTES "PLAIN" ERROR SO AS TO REQUIRE A NEW TRIAL ON THIS ISSUE

At trial, Tyler presented evidence that the O'Neills had engaged in a pattern of fraud and deceit spanning fifteen years and that they concealed their fraud for most of that time. This evidence bore directly upon the O'Neills' statute of limitations defense. The district court instructed the O'Neills to submit a proposed form of jury instruction on the statute of limitations defense. On June 1, 1998, The O'Neills submitted the following instruction:

> You must find against plaintiff on all claims for which you determine plaintiff knew, or in the exercise of reasonable diligence should have known about the conduct by defendants which form the basis for this action more than two years before this action was commenced.

After reviewing the proposed instruction, the trial court warned the O'Neills:

> It is your burden to come up with something. I will entertain that, to submit like the statute of limitations and to explain the statute of limitations.

On June 2, 1998, an untranscribed conference was held with the trial court at which Tyler objected to this instruction.

Based on Tyler's objections, the trial court rejected this instruction. Ultimately, on June 3, the last day of trial, the trial court, over Tyler's objection[5], provided a jury interrogatory as follows:

> If you answered "YES" to *any* part of Questions 1-4, when did Plaintiff, Gary Tyler, discover, or should have discovered, he was harmed by the conduct of the O'Neills which forms the basis of this action?

During deliberation, the jury asked for clarification of this interrogatory. Without consulting the parties, the district court submitted the following replacement interrogatories, the first dealing with actual knowledge and the second with constructive knowledge:

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5. Tyler objected as follows:

> Counsel: I object to this . . . Your Honor rejected this [language] yesterday . . . If Mr. Tyler learns that there's profits in the company, but he's not getting ten percent of them, he [the O'Neills' counsel] could argue there's harm, but there's no legal [harm], there's no cognizable legal right to Mr. Tyler to do anything about it . . . [N]o shareholder has a right to tell a corporation to pay out profits . . . The harm that occurred was that they were paying all the money out to themselves that Mr. Tyler did not know about. So, what is relevant is when he learned that they breached their fiduciary duties or defrauded him which is based on when he learned that the monies had been paid out to them or the facility had been placed in their names and not in the name of the corporation . . .

> When did plaintiff, Gary Tyler, discover he was harmed by the conduct of the O'Neills which forms the basis of the action?
>
> When should have plaintiff, Gary Tyler, discovered he was harmed by the conduct of the O'Neills which forms the basis of the action?

In response to the first, the jury found that Tyler discovered the harm in 1996. In response to the second, the jury found that Tyler should have discovered that he was being harmed in March, 1991.

The district court permitted the jury to consider the O'Neills' statute of limitation defense without giving them any instructions on: (1) which party bore the burden of proof on the statute of limitation defense; (2) the level of proof needed to sustain the defense; and (3) whether the statute could be tolled and if so, who bears the burden of establishing tolling. Thus, the district court's charge failed to cover the basic elements of the claims and defenses resulting in the denial of fundamental justice.

In deciding post verdict motions, the district court concluded that although Tyler objected to the form of the special jury interrogatory, he nevertheless waived any challenge to the instructions pursuant to Fed. R. Civ. P. 51 by failing to propose alternative language. App. B, 26a. However, the district ignored that fact that it had instructed the O'Neills to provide jury instructions for their affirmative defense. Further, the failure to instruct a jury as to an essential element of a claim of defense is "fundamental error." *Frederic P. Wiedesersum Associates v. National Homes Constr. Corp.*, 540 F.2d 62, 66 (2d Cir. 1976) ("consideration

of the alleged error may be appropriate even absent objection when necessary to correct a fundamental error or to prevent a miscarriage of justice"); Challenges to jury instructions, particularly those that deal with the key elements of claims and defenses asserted, may be considered even in the absence of objections where necessary to correct a fundamental error or to prevent the miscarriage of justice, *MacEdward v. Northern Elec. Co.*, 595 F.2d 105, 109-110 (2d Cir. 1979) ("an appellate court has the power to notice fundamental errors at trial even if the parties do not raise them on appeal"); *Stewart v. Hall*, 770 F.2d 1267, 1271 (4th Cir. 1985) (omission of an essential element fundamentally undermines the integrity of the trial); *O'Brien v. Willys Motors, Inc.*, 385 F.2d 163, 165-166 (6th Cir. 1967) (a reviewing court "may consider an error in instructions given or the failure to give an instruction where the error is obvious and prejudicial", even when counsel made no objections).

In this case, the Third Circuit incorporated, without comment or analysis, the opinion of the district court which merely concluded that Tyler had waived his rights by failing to submit jury instructions of his own, thus sanctioning a departure by the lower court from the accepted and usual course of judicial proceedings and in contrast to the approach taken by the Second, Fourth, and Sixth Circuits. This Court should exercise its supervisory power and grant certiorari in order to avert the plain miscarriage of justice and the conflict among the Circuits on how the failure to instruct a jury on critical elements of a claim is addressed.

CONCLUSION

For the foregoing reasons, the Court should grant certiorari and reverse the decision of the Third Circuit, vacate the November 2 and December 15 orders of the district court, and reinstate the Original Judgment.

Respectfully submitted,

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APPENDIX

APPENDIX A — MEMORANDUM OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED AND FILED JULY 26, 1999

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 98-1942, 98-2051 and 99-1017

GARY C. TYLER,

Appellant in No. 98-1942

v.

GEORGE M. O'NEILL; MICHELENIA O'NEILL;
WM. M. HENDRICKSON, INC.

George M. O'Neill; Michelenia O'Neill,
Appellants in No. 98-2051

GARY C. TYLER,

Appellant in No. 99-1017

v.

GEORGE M. O'NEILL; MICHELENIA O'NEILL; WM. M. HENDRICKSON, INC.; CORESTATES BANK, N.A.

Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civ. No. 97-cv-03353)
District Judge: Honorable J. Curtis Joyner

Appendix A

Submitted under Third Circuit LAR 34.1(a)
June 9, 1999
Before: SLOVITER and MANSMANN, *Circuit Judges*,
and WARD,* *District Judge*.

(Filed **JUL 26 1999**)

MEMORANDUM OPINION OF THE COURT

MANSMANN, *Circuit Judge*.

This matter involves three consolidated appeals. Gary Tyler, the plaintiff in an action alleging fraud, breach of fiduciary duty, and RICO-related claims in connection with the sale of shares in the William M. Hendrickson Company, Inc., appeals from orders of the District Court denying his post-trial motions and granting the post-trial motions filed by the defendants, George and Michelenia O'Neill. Tyler contends that the District Court erred in granting those motions based on its conclusion that Tyler's claims were barred by the statute of limitations. In this appeal, Tyler argues that the District Court erred in: (1) finding that it had jurisdiction to consider the O'Neills' motion for reconsideration; (2) granting the O'Neills' post-trial motion based on the statute of limitations; (3) denying Tyler's motion for additur or, in the alternative, for a new trial on the issue of damages as to Mrs. O'Neill; and (4) denying Tyler's motion to appoint a custodian and/or receiver for the Hendrickson Corporation. The O'Neills appeal from the

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* Honorable Robert J. Ward of the United States District Court for the Southern District of New York, sitting by designation.

District Court's initial denial of their own post-trial motions.[1] Because we are convinced that the District Court correctly disposed of each of the post-trial motions, we will affirm the orders of the District Court.

I.

The parties are familiar with the facts and the procedural history underlying this matter. As a result, we need not discuss the facts and will recount only those portions of the procedural history necessary to provide context for our conclusions of law.

In June 1998, the jury hearing this case returned a verdict by answering interrogatories. The jury found the O'Neills liable to Tyler for fraud and breach of fiduciary duty and awarded damages to Tyler in the amount of $225,000 against George O'Neill only. The jury also found that Tyler should have discovered the harm caused by the O'Neills' conduct by March 1991. Judgment on the verdict was entered on June 5, 1998.

The parties filed post-trial motions. Tyler filed a motion for judgment notwithstanding the verdict or, in the alternative, for a new trial as to damages with respect to Michelenia O'Neill. Tyler also moved that a custodian or receiver be appointed for William M. Hendrickson, Inc.

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1. A recounting of the procedural history will clarify that after the O'Neills filed their appeal, the District Court considered the merits of the O'Neills' post-trial motions and granted the O'Neills the substance of the relief requested.

Appendix A

The O'Neills filed a post-trial motion for judgment as a matter of law or, in the alternative, to vacate, alter, or amend the judgment. The O'Neills argued that the claims on which Tyler prevailed were time-barred. They rested this argument on the jury's interrogatory answer determining that Tyler should have discovered the harm caused by the O'Neills' conduct by March of 1991. Because Tyler's complaint was not filed until May 1997, well beyond the two year statue of limitations applicable to claims of fraud and breach of fiduciary duty, the O'Neills contended that his claims were untimely. The District Court, in an order dated October 6, 1998, dismissed the O'Neills' motion for lack of prosecution. The dismissal was unrelated to the merits of the motion, but was based instead on the District Court's finding that the O'Neills had failed to meet the trial transcript requirements of Local Rule 7.1(e). In the same order, the District Court denied Tyler's post-trial motions.

On October 7, 1998, the O'Neills filed a motion requesting that the court vacate its October 6th order and consider the merits of the O'Neills' post-trial motion. In an order dated October 8th the District Court denied the O'Neills' October 7th motion, again based on the O'Neills' failure to provide a complete trial transcript.

On October 13, 1998, Tyler filed an appeal asking that we review the District Court's October 6th denial of his post-trial motions.

On October 16, 1998, within the time specified in Local Rule 7.1(g), the O'Neills filed a motion for reconsideration

of the District Court's October 6th and October 8th orders.[2] After requesting and receiving submissions from the parties regarding its continuing jurisdiction to hear this motion, the District Court entered an order dated November 2, 1998 vacating the orders denying the O'Neills' post-trial motions.[3] The Court stated that it would "decide [the O'Neills'] post-trial motions upon receipt of the trial transcripts."

Tyler then filed a motion with this court requesting that we vacate our stay of his appeal and find that the District Court lacked jurisdiction to grant the November 2nd order. We denied this motion on December 29, 1998.

In an order dated December 15, 1998, the District Court granted the O'Neills' motion for judgment as a matter of law and vacated its order of Civil Judgment against the O'Neills; the Court concluded that the claims on which judgment was entered were, in fact, time-barred. Judgment in favor of the O'Neills was entered on all claims. Tyler filed a timely notice of appeal on December 23, 1998.

The parties' three appeals, two filed by Tyler and one filed by the O'Neills, were consolidated for purposes of disposition by our order dated January 25, 1999.

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2. On October 28, 1998, we entered an order staying Tyler's appeal pending the District Court's ruling on the O'Neills' October 16 motion.

3. On November 5, 1998 the O'Neills appealed the District Court's initial denial of their post-trial motions.

Appendix A

II.

We address first Tyler's challenge to the District Court's jurisdiction. Tyler summarized the jurisdictional question succinctly: "The simple issue before [us] is whether [the O'Neills' October 16th] motion for reconsideration, filed after [Tyler's] appeal and decided after [the O'Neills'] appeal, is the type of post-trial motion which stays appellate jurisdiction. If not, the [District Court] was without jurisdiction to enter the November 2 and December 15 orders."

Evaluation of this issue begins with Fed. R. App. P. 4(a)(4)(A), which reads:

> If a party timely files in the district court any of the of the following motions under the Federal Rules of Civil Procedure, the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion:
>
> (iv) to alter or amend the judgment under Rule 59;
>
> (v) for a new trial under Rule 59. . . .

"As a general rule, the timely filing of a notice of appeal is an event of jurisdictional significance, immediately conferring jurisdiction on a Court of Appeals and divesting a district court of its control over those aspects of the case involved in the appeal." *Venen v. Sweet*, 758 F.2d 117, 120 (3d Cir. 1985). There are, however, exceptions to this rule.

Where a party files a timely motion of a type specified in Fed. R. App. 4(a)(4), a prior notice of appeal has no effect and the District Court retains power to decide that motion. *Id.* at 121.[4]

Our orders of October 28th and December 18th staying Tylers' appeal and denying his request to vacate that stay, respectively, were based on the conclusion that a "timely post-decision motion of a type specified by Fed. R. App. P. 4(a)(4)(A) [was] pending in the district court." Order, October 28, 1998. We are convinced that this characterization of the motion at issue was accurate and that, as a result, the District Court retained jurisdiction to evaluate the October 16th motion on its merits.

III.

Having determined that the District Court retained jurisdiction to decide the O'Neills' motion for reconsideration on the merits, we turn to the District Court's Order vacating the Order of Civil Judgment against the O'Neills. The District Court entered judgment as a matter of law in favor of the O'Neills based on its conclusion that Tyler's claims for fraud and breach of fiduciary duty were barred by the statute of limitations. This finding was derived from the answers to special interrogatories posed to the jury.

---

4. As the O'Neills point out, Fed. R. App. P. 4(a) was amended in 1993. A motion of the type enumerated in that rule does not now nullify an appeal filed while the motion is pending; the appeal is now stayed until the District Court rules upon the outstanding motion.

Appendix A

Amended Jury Interrogatory No. 5. and the jury's responses read:

> a. When did plaintiff, Gary Tyler, discover he was harmed by the conduct of the O'Neills which forms the basis of this action?
>
> Mo./Yr. Nov. 1996
>
> b. When should have plaintiff, Gary Tyler, discovered he was harmed by the conduct of the O'Neills which forms the basis of this action?
>
> Mo./Yr. Mar. 1991

The statute of limitations governing claims for fraud and breach of fiduciary duty is two years. 42 Pa. Cons. Stat. Ann. § 5524. The District Court concluded that the limitations period was not tolled by fraudulent concealment and that, as a result, Tyler's complaint, filed in May 1997, was untimely.

Tyler challenged the District Court's conclusions with respect to the statute of limitations, arguing that: 1) the District Court erred in failing to deliver instructions to the jury concerning the statute of limitations; 2) the doctrine of fraudulent concealment served to toll the statute of limitations; 3) the causes of action asserted by Tyler were continuing torts not governed by the statute of limitations; 4) if the statute of limitations applies at all, it bars only a portion of the damages assessed by the jury; and 5) there was insufficient evidence from which the jury could have

concluded that Tyler should have known of his injury and its cause in March 1991.

The District Court considered each of these contentions thoroughly in its December 15, 1998 memorandum of decision. We have reviewed that discussion in conjunction with a careful evaluation of the record submitted to us. We are convinced that the District Court has correctly analyzed each of the issues with the appropriate references to the case law and the record. Because we do not find it necessary to restate or to amplify that discussion, we adopt the reasoning of the District Court in concluding that each of Tyler's claims is barred by the statute of limitations.

IV.

We have failed to find merit in any of the allegations of error raised by Tyler. We will, therefore, affirm the orders of the District Court denying Tyler's post-trial motions and granting the O'Neills' request that the order of Civil Judgment against them be vacated and entering judgment in favor of the O'Neills on all claims.

TO THE CLERK:

Please file the foregoing opinion.

s/ Carol Los Mansmann
Circuit Judge

JUL 26 1999

APPENDIX B — MEMORANDUM OF DECISION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA DATED DECEMBER 15, 1998 AND ENTERED DECEMBER 16, 1998

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION
NO. 97-3353

GARY C. TYLER

v.

GEORGE M. O'NEILL, MICHELENIA O'NEILL, and WM. M. HENDRICKSON, INC.

MEMORANDUM OF DECISION

THOMAS J. RUETER
United States Magistrate Judge

December 15, 1998

Presently before the court is the motion of defendants, George O'Neill and Michelenia O'Neill, for judgment as a matter of law and to vacate, alter or amend judgment. (Document No. 92.) Defendants move for judgment as a matter of law pursuant to Fed. R. Civ. P. 50(b), and to alter or amend the judgment or for a new trial pursuant to Fed. R. Civ. P. 52(b) and/or 59.

Appendix B

I. PROCEDURAL AND FACTUAL BACKGROUND

Plaintiff commenced this action against George O'Neill and Michelenia O'Neill on May 12, 1997, alleging claims of breach of fiduciary duty, fraud, violation of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§1961, et seq., and conspiracy to violate RICO arising out of his ten (10%) percent shareholder interest in William M. Hendrickson, Inc. ("Hendrickson" or the "company"). Plaintiff asserted his claims individually and derivatively on behalf of Hendrickson. A jury trial was held before the undersigned commencing on May 27, 1998. Defendants moved for judgment as a matter of law on all causes of action pursuant to Fed. R. Civ. P. 50 once plaintiff rested. Defendants' motion was based on insufficient evidence to substantiate any cause of action in favor of plaintiff and against defendants, and the statute of limitations. The court denied defendants' motion for judgment as a matter of law. Defendants renewed their motion for judgment as a matter of law at the close of their case asserting the same basis, including the statute of limitations. The court denied the renewed motion.

The jury rendered a verdict on June 4, 1998 by answering interrogatories. The jury determined that defendants were liable for breach of fiduciary duty and fraud to plaintiff individually, but not liable on plaintiff's other individual claims or on the derivative claims. (Jury Interrogatories Question Nos. 1-4, 6, 7; Document No. 8.) The jury awarded compensatory damages to plaintiff in the amount of $225,000 against George O'Neill and zero dollars against Michelenia O'Neill. (Jury Interrogatories Question No. 9.) The court

entered Civil Judgments in accordance with the jury's findings. (Document Nos. 87, 89.)

The court denied defendants' request for a jury instruction on the statute of limitations. Instead, the court submitted an interrogatory to the jury relevant to the statute of limitations issue. Amended Jury Interrogatory No. 5 and the jury's response were as follows:

> If you answered "YES" to *any* part of Questions 1-4,
>
> a. when did plaintiff, Gary Tyler, discover he was harmed by the conduct of the O'Neills which forms the basis of this action?
>
> Mo./Yr. Nov. 1996
>
> b. when should have plaintiff, Gary Tyler, discovered he was harmed by the conduct of the O'Neills which forms the basis of this action?
>
> Mo./Yr. Mar. 1991

(Amended Jury Interrogatory No. 5) (emphasis in original.)

The parties do not dispute that the statute of limitations for fraud and breach of fiduciary duty is two years. 42 Pa. Cons. Stat. Ann. §5524. In their post-trial motion, defendants contend that the jury's decision that plaintiff should have discovered the harm due to the conduct of the O'Neills, which

formed the basis for this action, in March, 1991, establishes that the causes of action on which plaintiff prevailed are time barred by the two year statute of limitations. Defendants maintain that the judgment in favor of plaintiff and against defendants should be vacated and a new judgment in favor of defendants and against plaintiff should be entered or, in the alternative, the judgment should be altered or amended to reflect that the statute of limitations bars recovery.

Defendants also seek that judgment be entered as a matter of law on the fraud and breach of fiduciary duty causes of action on the grounds that the evidence was insufficient to substantiate these claims. Finally, defendants argue that the evidence was insufficient to substantiate the damages award. They seek to reduce the amount of compensatory damages awarded in favor of plaintiff and against George O'Neill to an amount not to exceed $5,000 or, in the alternative, request a new trial concerning damages.

Plaintiff argues that the doctrine of fraudulent concealment tolled the statute of limitations and his claims, therefore, are timely. Plaintiff also contends that the causes of action in this matter are a continuing tort to which the statute of limitations does not apply. In the alternative, plaintiff argues that if the statute of limitations bars damages, it bars only a portion of the damages awarded by the jury. Finally, plaintiff maintains that sufficient evidence supports the jury's determinations.

This court need not reach defendants' arguments regarding the sufficiency of the evidence because it finds that the applicable two year statute of limitations bars

plaintiff's recovery on his fraud and breach of fiduciary duty claims. For the reasons stated below, this court will vacate the judgment in favor of plaintiff and against defendants George O'Neill and Michelenia O'Neill, and enter judgment in favor of defendants and against plaintiff as plaintiff's action is time barred.

II. DISCUSSION

The parties agree that the applicable statute of limitations for plaintiff's fraud and breach of fiduciary duty claims is two years. 42 Pa. Cons. Stat. Ann. §5524. The statute of limitations begins to run as soon as the underlying cause of action accrues. *Bohus v. Beloff*, 950 F.2d 919, 924 (3d Cir. 1991); *Pocono Int'l Raceway, Inc. v. Pocono Produce, Inc.*, 503 Pa. 80, 84, 468 A.2d 468, 471 (1983). "It is the duty of the party asserting a cause of action to use all reasonable diligence to properly inform himself of the facts and circumstances upon which the right of recovery is based and to institute suit within the prescribed period." *Hayward v. Medical Center of Beaver County*, 530 Pa. 320, 324, 608 A.2d 1040, 1042 (1992) (citation omitted). For purposes of statutes of limitation, "a claimant need only be put on inquiry notice by 'storm warnings' of possible fraud." *Ciccarelli v. Gichner Systems Group, Inc.*, 862 F. Supp. 1293, 1301 (M.D. Pa. 1994). Inquiry notice is sufficient information to "awaken inquiry and direct diligence in the channel in which it would be successful." *Bohus*, 950 F.2d at 925.

Once the statutory period has expired, the injured party will be barred from bringing his cause of action unless the statute of limitations has been tolled. *Bohus*, 950 F.2d 924.

Appendix B

The discovery rule tolls the statute of limitations when a plaintiff, despite the exercise of due diligence, is unable to know of the existence of the injury and its cause. *Id.* (citing *Pocono*, 503 Pa. at 85, 468 A.2d at 468.) "The polestar of the Pennsylvania discovery rule is not a plaintiff's actual acquisition of knowledge but whether the information, through the exercise of due diligence, was knowable to the plaintiff. Failure to make inquiry when information is available is failure to exercise reasonable diligence as a matter of law." *Ingenito v. AC&S, Inc.*, 430 Pa. Super. 129, 133-35, 633 A.2d 1172, 1174-75 (1993) (en banc), *appeal denied*, 542 Pa. 671, 668 A.2d 1133 (1995) (table).

The doctrine of fraudulent concealment tolls the statute of limitations where "through fraud of concealment the defendant causes the plaintiff to relax his vigilance or deviate from the right of inquiry." *Bohus*, 950 F.2d at 925. There must be an affirmative and independent act of concealment, albeit intentional or unintentional, that would divert or mislead the plaintiff from discovering the injury. *Id.* Like the discovery rule, when fraudulent concealment is established, the statute of limitations is tolled until the plaintiff knew, or using reasonable diligence, should have known of the injury and its cause. *Id.* at 925-26. As the Third Circuit stated,

> "[T]he Supreme Court [of Pennsylvania] views tolling the statute of limitations in terms of the 'knew or should have known' standard whether the statute is tolled because of the discovery rule or because of fraudulent concealment." Thus, the inquiry under the fraudulent concealment doctrine is the same as that under the discovery rule.

Id. at 926 (citations omitted) (footnote omitted). In Pennsylvania, fraudulent concealment will not toll the running of the statute of limitations period when a plaintiff has not exercised reasonable diligence. *Urland v. Merrell-Dow Pharmaceuticals*, 822 F.2d 1268, 1273-74 (3d Cir. 1987). *See also Klehr v. A.O. Smith, Corp.*, 117 S.Ct. 1984, 1993 (1997) (applying same rule to civil RICO). Stated another way, even if a defendant commits fraud or concealment, a plaintiff must show that his ignorance of his injury and its cause was not due to his own lack of reasonable diligence. *See, e.g., DeMartino v. Albert Einstein Medical Center*, 313 Pa. Super, 492, 506, 460 A.2d 295, 302 (1983) (finding no fraudulent concealment because plaintiffs' reliance upon a misleading statement of defendant was unreasonable.) *See also Davis v. Grusemeyer*, 996 F.2d 617, 624 n.13 (3d Cir. 1993) (discussing in civil RICO case the requirement that plaintiff exercise reasonable diligence before limitations period will be tolled because of defendant's fraudulent concealment.)

The plaintiff bears the burden of proving that the statute of limitations has been tolled. *Van Buskirk v. Carey Canadian Mines, Ltd.*, 760 F.2d 481, 487 (3d Cir. 1985). "The plaintiff has the burden of proving fraudulent concealment by 'clear, precise and convincing' evidence." *Bohus*, 950 F.2d at 925 (citing *Molineaux v. Reed*, 516 Pa. 398, 403, 532 A.2d 792, 794 (1987)). *See also Nesbitt v. Erie Coach Co.*, 416 Pa. 89, 92-93, 204 A.2d 473, 475 (1964) (same). The question of whether a claimant has exercised due diligence in discovering a cause of action is usually one for the jury. *Bohus*, 950 F.2d at 925; *Ciccarelli*, 862 F. Supp. at 1301. The Pennsylvania Supreme Court explained the jury's role as follows:

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> Whether the statute has run on a claim is usually a question of law for the trial judge, but where the issue involves a factual determination, the determination is for the jury. Specifically, the point at which the complaining party should reasonably be aware that he has suffered an injury is generally an issue of fact to be determined by the jury; only where the facts are so clear that reasonable minds cannot differ may the commencement of the limitations period be determined as a matter of law.

Hayward, 530 Pa. at 325, 608 A.2d at 1043 (citations omitted).

Where the question goes to the jury, this court's role is limited to determining whether sufficient evidence supported the jury's conclusion. *See Van Buskirk*, 760 F.2d at 487 ("Whether or when a plaintiff knows or has reason to know of the existence and cause of his or her injury will often turn on inferences drawn from disputed facts. Where the question goes to the jury, . . . , our review is limited to ascertaining whether sufficient evidence existed to support the jury's conclusion.") Here, this court finds sufficient evidence existed in the record to support the jury's conclusion that plaintiff should have discovered he was harmed by the conduct of the O'Neills which forms the basis of this action in March, 1991. The evidence on which the jury may have based its determination included the following testimony by plaintiff.

Q [Defense Counsel]: At some point in time you developed the opinion that you had not received your fair share of the profits in terms of dividend payments from Hendrickson, is that right?

A [Gary C. Tyler]: Yes.

Q: You first developed the opinion that you had not been adequately compensated from Hendrickson in terms of dividends by April, 1995?

A: It was in — Yes, '90 — '91.

Q: 1991?

A: Uh-huh.

Q: Is that right?

A: Yes.

Q: And what did you do about it?

A: Nothing.

Q: Did you ever ask Mr. O'Neill for any Bankruptcy Court materials?

A: No.

Q: Mr. O'Neill sent you financial information concerning Hendrickson from time-to-time?

A: Yes.

Q: Did you request financial information concerning Hendrickson from time-to-time?

A: Yes.

Q: You wanted the financial information so that you could maintain an understanding about how the company was doing?

A: Yes.

Q: On the financial statement reflected or [sic] financial information, reflected income and profits to the company?

A: Yes.

Q: Was there ever an occasion when you brought to Mr. O'Neill's attention that you believed that you had not received ten percent of those profits as reflected on the financial information?

A: No.

(N.T. 5/29/98 (Document No. 82) at 20-21.)

Additionally, plaintiff testified that he received a copy of a 1991 business plan for the company which reflected income for the years 1985 through 1991 and which showed that the dividends he had received were less than 10% of the

company's income. (N.T. 5/29/98 (Document No. 120) at 72; Exh. P-208; Pl.'s Mem. Opp. Mot. for Jmt. as a Matter of Law at 14.) Plaintiff testified that Mr. O'Neill told him the numbers were incorrect and no monies would be paid out from the company for the years 1987 to 1989 because the company needed to purchase a new facility. (N.T. 5/29/98 (Document No. 120) at 63-64; Pl.'s Mem. Opp. Mot. for Jmt. as a Matter of Law at 14.) Plaintiff also testified that in 1993 he traveled to the Hendrickson facility at the request of Mr. O'Neill to assist Mr. O'Neill in updating the company's 1991 business plan. (N.T. 5/29/98 (Document No. 82) at 30.) Mr. Tyler testified that in 1993 he again did not question why the amount of dividends he received was less than 10% of the company's income, because Mr. O'Neill told him that the figures on the chart did not "correlate, and these figures aren't quite right." Mr. Tyler further testified that Mr. O'Neill had put an "X" across the chart and said he would take care of those figures later. (N.T. 5/29/98 (Document No. 82) at 31; Exh. P-208.) From this evidence, i.e., Mr. Tyler's testimony that he suspected he was not getting the correct amount in dividends starting in 1991 coupled with his testimony that he saw the 1991 business plan which revealed that he had not received dividends representing 10% of the company's income, the jury could reasonably conclude that plaintiff knew or had reason to know more than two years prior to the commencement of this lawsuit that he had suffered an injury and its cause.

Plaintiff argues that the statute of limitations was tolled because defendants fraudulently concealed information causing plaintiff to relax his vigilance. As stated above, it is plaintiff's burden to prove fraudulent concealment by

providing "clear, precise and convincing evidence." Plaintiff has not met this burden. Plaintiff claims that six acts of deception satisfy the requirements to toll the statute of limitations under the doctrine of fraudulent concealment: (1) Mr. O'Neill told Mr. Tyler in May, 1991 that the figures in the 1991 business plan were incorrect and that he had not taken any money out of the company; (2) Mr. O'Neill concealed plaintiff's interest in the company's bankruptcy filing in 1994 in order to avoid service of papers on plaintiff; (3) defendants filed false tax returns from 1987 through 1996 concealing plaintiff's interest in the company which permitted them to conceal the tax returns from plaintiff; (4) defendants submitted false financial statements to the company's lender from 1989 through 1997 which concealed plaintiff's interest in the company, and caused the lender not to seek information from plaintiff which then would have enabled plaintiff to discover certain matters defendants allegedly were attempting to conceal from him; (5) defendants concealed that the company's new facility was titled in their names, not the company's; and (6) Mr. O'Neill concealed the company's true financial statements from plaintiff from 1982 through 1996 in order to conceal the overall fraud. (Pl.'s Mem. Opp. Mot. for Jmt. as Matter of Law at 17-20.)

The jury, however, was presented with all of this evidence. The "concealment" alleged by plaintiff is that defendants did not list plaintiff's 10% interest in the company in the company's financial statements, tax returns, lending documents, or bankruptcy papers. Plaintiff also contends that defendants concealed their ownership of the company's new facility and that company monies allegedly were being used

to bribe a customer. Defendants presented counter arguments to each argument raised by plaintiff. Mr. O'Neill testified that plaintiff asked him not to reveal his interest in the company and that he merely honored this request. (N.T. 5/28/98 at 52-56.) Plaintiff denies making this request. (N.T. 5/29/98 (Document No. 120) at 55.) Regardless, plaintiff admits that Mr. O'Neill provided him with financial information regarding the company throughout the years (N.T. 5/29/98 (Document No. 120) at 65-66), sent him all the information he requested (N.T. 5/29/98 (Document No. 82) at 27), spoke with him frequently about the business (N.T. 5/29/98 (Document No. 82) at 32), and discussed with him the bankruptcy proceeding (N.T. 5/29/98 (Document No. 120) at 75-76.) Moreover, plaintiff testified that he received financial information from Mr. O'Neill which showed that consulting fees had been paid, but denied knowing that they were paid to Mr. O'Neill. (N.T. 5/29/98 (Document No. 120) at 68; Exhs. P-20, P-205.) Plaintiff apparently did not ask Mr. O'Neill to whom the consulting fees were paid. Defendants presented testimony that the alleged "bribes" were actually loans by Mr. O'Neill of his personal funds to a customer who was also a life long friend, which were repaid. (N.T. 5/28/98 at 165-70; 5/29/98 (Document No. 132) at 51-55.) Mr. O'Neill also testified that he told plaintiff that the new facility would be titled in defendants' names, not the company's name. (N.T. 5/28/98 at 130.) The jury heard Mr. O'Neill's testimony that he did not inform plaintiff that he had received consulting fees from the company. (N.T. 5/28/98 at 65, 80-81, 86, 88, 91, 110-11, 115, 116.) Mr. O'Neill also testified that he assumed plaintiff knew that he would receive monies from the company because the company was a Subchapter-S corporation, and Mr. O'Neill

would have to personally pay the company's taxes and would take money from the company to pay those taxes. (N.T. 5/28/98 at 101, 116.) The record demonstrates that plaintiff never paid his share of the corporate taxes. (N.T. 5/29/98 (Document No. 82) at 2-4.) Moreover, Mr. O'Neill also testified that he used money from the company to purchase machinery and equipment. (N.T. 5/28/98 at 110-11, 116.)

There is sufficient evidence in the record from which the jury could have concluded that plaintiff should have known of his injury and its cause in March, 1991. The record shows that the jury could have concluded that the defendants' evidence countered each act of concealment alleged by plaintiff, or that plaintiff failed to exercise reasonable diligence, so that the statute of limitations was not tolled and began to run in March, 1991.[1]

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1. Plaintiff's claim that the statute of limitations is not tolled because his claims are in the nature of continuing torts must be denied. A cause of action for a continuous injury accrues when the wrong terminates. *See Stuebig v. Hammel*, 446 F. Supp. 31, 35 (M.D. Pa. 1977). Generally, however, a "continuous injury" arises in occupational disease cases, *see Fowkes v. Pennsylvania R.R. Co.*, 264 F.2d 397 (3d Cir. 1959); *Plazak v. Allegheny Steel Co.*, 324 Pa. 422, 188 A. 130 (1936), in cases involving a contract for continuous service which is silent as to duration, *see Wm. B. Tenny, Builder and Developer v. Dauphin Dep. Bank & Trust Co.*, 302 Pa. Super. 342, 448 A.2d 1073 (1982), or such other analogous factual situation, *see Stuebig v. Hammel*, 446 F. Supp. 31 (M.D. Pa. 1977) (a §1983 action arising out of the failure of defendants to properly terminate an involuntary commitment to a mental hospital.) Plaintiff presented no case, nor has this court uncovered one, in which the garden variety fraud and breach of fiduciary duty claims alleged here are treated as claims for "continuous injury".

Appendix B

Plaintiff argues in the alternative that if the statute of limitations bars damages, it does not bar all damages, only damages related to "Bonus Payments." (Pl.'s Mem. Opp. Mot. for Jmt. as a Matter of Law at 21.) Specifically, plaintiff argues the following:

> Defendants' sole argument is that Tyler knew that "he had not been adequately compensated from Hendrickson concerning dividends" in March, 1991. *June 1 Transcript*, p. 3-4. Defendants made no argument that Tyler should have or could have learned of any other acts of misconduct by the O'Neills. Thus any argument that the statute of limitations bars Plaintiff's claim for damages other than those for the Bonus Payments has been waived.

Id. Plaintiff's argument reveals a misunderstanding of the discovery rule. As stated above, for purposes of statutes of limitation, a claimant need only be put on inquiry notice by 'storm warnings' of possible fraud. Inquiry notice is sufficient information to "awaken inquiry and direct diligence in the channel in which it would be successful." *Bohus*, 950 F.2d at 925. Knowledge that he had not been properly compensated raises sufficient "storm warnings" to satisfy the requirement of inquiry notice. At that point, plaintiff had a duty to exercise diligence in investigating and protecting his rights. *See Bohus*, 950 F.2d at 925 ("Every plaintiff has a duty to exercise 'reasonable diligence' in ascertaining the existence of the injury and its cause.") Instead, he testified that he did "nothing". (N.T. 5/29/98 (Document No. 82) at 20-21.) The statute of limitations is

designed to prevent parties from sleeping on their rights and then attempting to enforce them years later.

The court will address one final argument raised by plaintiff, even though it appears that plaintiff, by placing his argument in a footnote in his memorandum of law in opposition to defendants' instant motion, is not pressing this argument. However, because of the importance of this matter, the court will consider it. Plaintiff objected at trial to the interrogatory asking when plaintiff knew or should have known of his injury and its cause, but did not propose alternative language. (N.T. 6/1/98 at (Document No. 90) at 34-35; 6/2/98 at 3; 6/3/98 (Document No. 103) at 2-4.) Plaintiff now argues that the interrogatory was faulty in three respects: (1) it did not accurately state the standard for the discovery rule; (2) no instructions were given explaining defendants' burden of proof with respect to an affirmative defense such as the statute of limitations; and (3) no instructions were given concerning the doctrine of fraudulent concealment. (Pl.'s Mem. Opp. Mot. for Jmt. as Matter of Law at 13 n.3.)

As stated above, the question of whether a claimant has exercised due diligence in discovering a cause of action is usually one for the jury. *See also Thompson v. Glenmede Trust Co.*, 1994 WL 675186, at *4 (E.D. Pa. Nov. 23, 1994) ("The point at which a plaintiff reasonably should be aware that he has suffered an injury is generally an issue of fact to be determined by a jury."); *Kelley v. Tupitza*, 1993 WL 441773, at *3 (E.D. Pa. 1993) (same). In *Van Buskirk*, 760 F.2d at 486-87, the Court of Appeals concluded that the "relevant inquiry was whether each employee knew or had reason to know that he had an asbestos-related condition

caused by asbestos fiber at the Philip Carey plant prior to November 28, 1976 (two years before suit was filed)." This court followed the proper procedure when it submitted Amended Jury Interrogatory No. 5, quoted above, to the jury. Moreover, the interrogatory properly stated the relevant inquiry under both the discovery rule and the doctrine of fraudulent concealment. *See also Bohus*, 950 F.2d at 926 ("[T]he inquiry under the fraudulent concealment doctrine is the same as that under the discovery rule.")

Plaintiff never requested a jury instruction on fraudulent concealment or the burdens of proof with respect to the statute of limitations. With respect to burdens of proof, the jury was instructed that plaintiff's burden of proof was by a preponderance of the evidence. In this instruction, the court instructed the jury that "it is the responsibility of the plaintiff, Gary C. Tyler, to prove every essential part of his claims by a 'preponderance of the evidence'." (Document No. 81.) The court also instructed the jury that plaintiff had the burden of proving his claim for common law fraud by "clear and convincing evidence." (Document No. 81.) Plaintiff did not request any additional instructions on burdens of proof. Counsel and the court discussed jury interrogatories and instructions over a period of several days, June 1-3, 1998. At any time during those colloquies, plaintiff's counsel could have requested additional instructions or proposed alternative interrogatories regarding the statute of limitations issue, but did not. Consequently, under Fed. R. Civ. P. 51[2] plaintiff

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2. Fed. R. Civ. P. 51 states in pertinent part as follows:

> No party may assign as error the giving or the failure to give an instruction unless that party objects thereto

(Cont'd)

has waived any objection that this court did not include additional instructions. *See Smith v. Borough of Wilkinsburg*, 147 F.3d 272, 277 (3d Cir. 1998).

For all the foregoing reasons, this court grants defendants George M. O'Neill and Michelenia O'Neill's motion for judgment as a matter of law and to vacate, alter or amend judgment. Plaintiff's claims of fraud and breach of fiduciary duty are barred by the statute of limitations. This court will enter an order vacating its order of Civil Judgment against George M. O'Neill and Michelenia O'Neill entered in accordance with the jury's findings. (Document No. 87.) An appropriate order follows.

BY THE COURT:

s/ Thomas J. Rueter
THOMAS J. RUETER
United States Magistrate Judge

(Cont'd)

before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection.

Appendix B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION
NO. 97-3353

GARY C. TYLER

v.

GEORGE M. O'NEILL, MICHELENIA O'NEILL,
and WM. M. HENDRICKSON, INC.

ORDER

AND NOW, this 15th day of December, 1998, upon consideration of the motion of defendants, George O'Neill and Michelenia O'Neill, for judgment as a matter of law and to vacate, alter or amend judgment (Document No. 92), and for the reasons stated in the accompanying Memorandum of Decision, it is hereby

ORDERED

1. The motion is GRANTED;

2. The court's order of Civil Judgment (Document No. 87) against George M. O'Neill and Michelenia O'Neill is VACATED; and

3. Judgment is hereby entered in favor of defendants, George M. O'Neill and Michelenia O'Neill, and against plaintiff, Gary C. Tyler, on all claims.

BY THE COURT:

s/ Thomas J. Rueter
THOMAS J. RUETER
United States Magistrate Judge

APPENDIX C — MEMORANDUM ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA DATED, ENTERED AND FILED NOVEMBER 2, 1998

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION
NO. 97-3353

GARY C. TYLER

v.

GEORGE M. O'NEILL, et al.

MEMORANDUM ORDER

Presently before the court is defendant's motion for reconsideration of this court's orders of October 6, 1998 and October 8, 1998, and that this court consider defendants' post-trial motions on their merits. (Docket No. 119.) By orders of October 6, 1998 and October 8, 1998, this court denied defendants' post-trial motions for failure to comply with Local Rule of Civil Procedure 7.1(e), which requires defendants to order the transcripts of the trial within fourteen (14) days after the filing of any post-trial motion. As of the date of the filing of defendants' latest motion, October 16, 1998, defendants have complied with Local Rule 7.1(e). It took defendants nearly four months to comply with this rule (their post-trial motions were filed on June 15, 1998). Nonetheless, this court will GRANT defendants' motion for reconsideration and will consider defendants' post-trial motions on the merits as soon as practicable after receipt of all the transcripts.

Appendix C

The court is granting this motion primarily for reasons of judicial economy. The issues raised by defendants' post-trial motions are significant, and this court never addressed the merits of the issues. Defendants have advised that should this court not reach the merits, the defendants will appeal to the Court of Appeals for the Third Circuit, and raise the identical issues raised in their post-trial motions. Having this court first decide the merits of these motions may obviate the need for the Third Circuit to review these issues. Alternatively, should there be an appeal, this court's opinion would assist the Court of Appeals in deciding these issues. *See Vadino v. A. Valey Engineers*, 903 F.2d 253, 258-59 (3d Cir. 1990) (Sloviter, C.J.) (stating that a written opinion from the district court "is particularly desirable to aid possible appellate review. . . . it would greatly assist the parties in confining their briefs on appeal to the relevant issues and would enable us to avoid consideration of unnecessary issues.") Accordingly, in the interest of justice, the motion for reconsideration is GRANTED. The portions of the court's October 6, 1998 and October 8, 1998 orders denying the defendants' post-trial motions are VACATED and the court will decide defendants' post-trial motions upon receipt of the trial transcripts.[1]

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1. By order dated October 22, 1998, this court ordered both parties to file briefs on the issue of whether this court retains jurisdiction to decide the defendants' motion for reconsideration, in view of the Notice of Appeal filed by plaintiff. Both parties filed briefs setting forth their positions. For the reasons set forth in defendants' brief and in *Avellino v Herron*, 991 F.Supp. 730, 732 n.3 (E.D. Pa. 1998), this court finds it has jurisdiction to grant the motion for reconsideration and vacate its previous orders.

Appendix C

DATED: Nov. 2, 1998 BY THE COURT:

s/ Thomas J. Rueter
THOMAS J. RUETER
United States Magistrate Judge

APPENDIX D — MEMORANDUM ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA DATED AND FILED OCTOBER 6, 1998 AND ENTERED OCTOBER 7, 1998

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION
NO. 97-3353

GARY C. TYLER,

v.

GEORGE M. O'NEILL, et al.

MEMORANDUM ORDER

THOMAS J. RUETER
United States Magistrate Judge

October 6, 1998

Presently before the court are the following post-trial motions: (1) defendants' motion for judgment as a matter of law and to vacate, alter or amend judgment (Document No. 92); (2) plaintiff's motion for judgment notwithstanding the verdict or, in the alternative, for new trial against Michelenia O'Neill on the issue of damages only (Document No. 94); and (3) plaintiff's application for appointment of custodian and receiver for Wm. M. Hendrickson, Inc. (Document No. 95.)

Appendix D

Defendants George O'Neill and Michelenia O'Neill filed a motion for judgment as a matter of law and to vacate, alter or amend judgment. (Document No. 92). The jury determined that the O'Neills individually were liable for breach of fiduciary duty and fraud to plaintiff, but not liable on the derivative claims or to plaintiff for violation of RICO or conspiracy to violate RICO. (Jury Interrogatories ("Jury Int.") Question Nos. 1-4, 6-7.) The jury also found that plaintiff should have discovered the harm due to the conduct of the O'Neills which formed the basis of the action by March, 1991. (Jury Int. Amended Question No. 5.) In their motion, the O'Neills argue that since the statute of limitations for fraud and breach of fiduciary duty is two years and this action was commenced on May 12, 1997, the causes of action on which plaintiff prevailed are time barred. (Defs.' Mot. for Jmt. at 2-3.)

Defendants filed their motion on June 15, 1998. This court entered an Order dated August 11, 1998 which stated in pertinent part the following:

> the court having received the following post-trial motions, (Document Nos. 92, 94, 95), and responses thereto, and it further appearing that neither party has complied with Local Rule of Civil Procedure 7.1(e), it is hereby **ORDERED** that the parties shall comply with all terms of the rule by August 18, 1998; otherwise the motions will be dismissed for lack of prosecution.

Tyler v. O'Neill, No. 97-3353, Order (E.D. Pa. August 11, 1998) (footnote omitted). At that time, the docket revealed

that the parties had ordered portions of the trial transcripts, but not the complete trial transcript. Local Rule of Civil Procedure 7.1(e) provides as follows:

> (e) Within fourteen (14) days after filing any post-trial motion, the movant shall either (a) order a transcript of the trial by a writing delivered to the Court Reporter Supervisor, or (b) file a verified motion showing good cause to be excused from the requirement. Unless a transcript is thus ordered, or the movant excused from ordering a transcript, the post-trial motion may be dismissed for lack of prosecution.

On August 14, 1998, plaintiff filed an emergency motion to be excused from complying with Local Rule of Civil Procedure 7.1(e) (Document No. 110) arguing that plaintiff's motions are "in the nature of cross-motions" to defendants' motion, and that if defendants do not order the trial transcript, "Plaintiff will withdraw his motions and stand on the judgment as entered." (Pl.'s Emergency Mot. at ¶¶5, 6.) By letter dated August 17, 1998, defendants' counsel ordered the trial transcript. By Order dated August 18, 1998, this court granted plaintiff's emergency motion to be excused from complying with Local Rule 7.1(e), since the defendants had already ordered the trial transcript. *Tyler v. O'Neill*, No. 97-3353, Order (E.D. Pa. August 18, 1998). By letter dated September 19, 1998, the Supervisor of Court Reporting for the Eastern District of Pennsylvania referred to a prior conversation and informed defendants' counsel that payment of the total estimated cost is required before transcription is started. This letter provided defendants' counsel with the

estimated costs of transcription and to whom he should remit checks or money orders. As of October 5, 1998, defendants have not paid the estimated costs and transcription has not begun.

In accordance with Local Rule of Civil Procedure 7.1(e), defendants' motion for judgment as a matter of law and to vacate, alter or amend judgment (Document No. 92) is dismissed for lack of prosecution. Pursuant to plaintiff's representations in his emergency motion, plaintiff will withdraw his two motions which are, therefore, denied.

Because this court granted plaintiff's emergency motion excusing him from complying with Local Rule of Civil Procedure 7.1(e), this court feels compelled to review the merits of plaintiff's motions, even though plaintiff previously told the court he would withdraw the motions should defendants not order the transcript. Having reviewed plaintiff's motions, the court denies them on their merits. In his motion for judgment notwithstanding the verdict or, in the alternative, for a new trial against Michelenia O'Neill on the issue of damages only (Document No. 94), plaintiff alleges that the verdict of the jury is inconsistent because the jury found Michelenia O'Neill liable to plaintiff for fraud and breach of fiduciary duty, but awarded no damages to plaintiff against Mrs. O'Neill. Plaintiff requests this court to either grant an additur to the plaintiff or grant a new trial on the issue of damages against Mrs. O'Neill.

It is well established that when considering a claim that a jury verdict is inconsistent, the court must read the verdict in a manner that will resolve inconsistencies. *Gallick v.*

Baltimore & Ohio R. Co., 372 U.S. 108, 119 (1963); *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.*, 369 U.S. 355, 364 (1962); *Mosley v. Wilson*, 102 F.3d 85, 90 (3d Cir. 1996). After careful review of the jury's answer to the interrogatories, and the entire record, this court concludes that the jury's answers to the interrogatories are not inconsistent. In its interrogatories, the jury found both Mr. and Mrs. O'Neill liable to plaintiff for fraud and breach of fiduciary duty, and found that the amount of $225,000 was an award sufficient to compensate plaintiff for his injuries. It was entirely within the jury's discretion to impose the burden of compensating plaintiff for his injuries on Mr. O'Neill rather than his wife. *See Gentile v. County of Suffolk*, 926 F.2d 142, 154 (2d Cir. 1991). The verdict makes sense since Mrs. O'Neill was only an uncompensated employee of the business of Wm. M. Hendrickson, Inc., and was not an officer, director or shareholder of the business. It was Mr. O'Neill who headed the company and oversaw its day-to-day operations. Finding that Mr. O'Neill should pay for the damages, as opposed to Mrs. O'Neill, is not inconsistent but shows thoughtfulness and judgment on the part of the jury.

Plaintiff's request for additur must be denied since in federal court the granting of an additur would violate the defendants' Seventh Amendment right to a trial by jury. *See Dimick v. Scheidt*, 293 U.S. 474, 486-87 (1935); *Gentile*, 926 F.2d at 155; *Calloway v. Hobart Corp.*, 1993 WL 172898, at *6 (E.D. Pa. May 18, 1993). Even if this court did have the authority to grant the additur, the court will not grant the request here for the reasons stated above.

Appendix D

This court also denies plaintiff's application for appointment of custodian and receiver for Wm. M. Hendrickson and to involuntarily sell or dissolve the corporation (Document No. 95) on the merits. The court has discretion to appoint a custodian or receiver and to order the dissolution of a corporation under 15 Pa. Cons. Stat. Ann. §§1767 and 1981 (West 1995). This remedy, however, is a drastic one to be applied cautiously and only in clear cases. *See Stainton v. Trantino*, 637 F.Supp. 1051, 1072 (E.D. Pa. 1986) (The "court should exercise its power to appoint a receiver 'sparingly, with caution and circumspection, and only in an extreme case under extraordinary circumstances, or under such circumstances as demand or require summary relief.' ") (quoting *Hankin v. Hankin*, 507 Pa. 603, 608, 493 A.2d 675 (1985)). *See also Cerami v. Dignazio*, 283 Pa. Super. 424, 439, 424 A.2d 881, 889 (1980) (the remedy provided in 15 Pa. Cons. Stat. Ann. §1981 should be applied only in extreme circumstances). In the instant matter, no circumstances exist which warrant the court to invoke such a drastic and extraordinary remedy. There are no substantiated allegations of present waste, mismanagement, fraud, or dissipation. Allegations of ongoing misconduct and statements concerning "threats" by a bank and an "investigation" by one of the corporation's customers by plaintiff in his reply brief (Pl.'s Reply Brief at 8), do not establish such extraordinary circumstances as to warrant the appointment of a custodian and receiver and dissolution of the corporation. Accordingly, plaintiff's application for appointment of a receiver is denied.

Appendix D

For all of the foregoing reasons, it is hereby

ORDERED

1. Defendants' motion for judgment as a matter of law and to vacate, alter or amend judgment (Document No. 92) is **DISMISSED** for lack of prosecution;

2. Plaintiff's motion for judgment notwithstanding the verdict or, in the alternative, for new trial against Michelenia O'Neill on the issue of damages only (Document No. 94) is **DENIED**; and

3. Plaintiff's application for appointment of custodian and receiver for Wm. M. Hendrickson, Inc. (Document No. 95) is **DENIED**.

BY THE COURT:

s/ Thomas J. Rueter
THOMAS J. RUETER
United States Magistrate Judge

APPENDIX E — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA DATED AND ENTERED OCTOBER 8, 1998

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION
NO. 97-3353

GARY C. TYLER

v.

GEORGE M. O'NEILL, et al.

ORDER

AND NOW, this 8th day of October, 1998, upon consideration of the defendants' Motion to Vacate Order Dismissing Defendant's Motion for Judgment as a Matter of Law, and to Vacate, Alter or Amend Judgment, it is hereby

ORDERED

that the motion be and the same is DENIED. Contrary to the assertion of defendants, the entire transcript of the trial proceeding is necessary to review defendants' claims that the evidence is insufficient and that the plaintiff's claims are barred by the statute of limitations. Furthermore, for the reasons stated in this court's order of October 6, 1998,

defendants did not comply with Local Rule 7.1(e) in a timely manner.

BY THE COURT:

s/ Thomas J. Rueter
THOMAS J. RUETER
United States Magistrate Judge

APPENDIX F — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DENYING PETITION FOR REHEARING DATED AUGUST 24, 1999

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 98-1942, 98-2051 and 99-1017

GARY C. TYLER,

Appellant in Nos. 98-1942 and 99-1017

v.

GEORGE M. O'NEILL; MICHELENIA O'NEILL;
WM. M. HENDRICKSON, INC.

George M. O'Neill; Michelinia O'Neill,
Appellants in No. 98-2051

Present: BECKER, *Chief Judge*,
SLOVITER, MANSMANN, GREENBERG, SCIRICA
NYGAARD, ALITO, ROTH, MCKEE and RENDELL
Circuit Judges, and WARD, *District Judge*.*

SUR PETITION FOR REHEARING

The petition for rehearing filed by Gary C. Tyler in the above entitled case having been submitted to the judges who participated in the decision of this court and to all other

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* Judge Ward voted only as to panel rehearing.

available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

BY THE COURT,

AUG 24 1999

s/ Carol Los Mansmann
Circuit Judge